JD(SF)–31–05
Las Vegas, Nevada

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

MERCY, INC., d/b/a
AMERICAN MEDICAL RESPONSE

and Case 28-CA-19495

SERVICE EMPLOYEES INTER-
NATIONAL UNION, LOCAL 1107, AFL-CIO

Joel C. Schochet, Esq., of Las Vegas,
Nevada, for the General Counsel.

Brooke Pierman, Esq., of Sacramento, California,
for the Charging Party.

Julian B. Bellenghi, Esq., Irvine, California,
for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Las Vegas, Nevada, on March, 16, 2005,[1] upon the General Counsel's complaint which alleged that in negotiations, the Respondent demanded agreement on non mandatory subjects of bargaining and refused the Charging Party's request for relevant information all in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

At the hearing, the Respondent withdrew its answer denying the substantive allegations of the complaint and the General Counsel moved for judgment on the pleadings, to which neither the Charging Party or Respondent objected. Left for decision is the remedy – specifically, whether and to what extent the Charging Party's certification as the employees bargaining representative should be extended.

In brief, the General Counsel contends that the Union's certification should be extended three months. The Respondent argues that it should not be extended at all, but if any extension is warranted, then it should be no more than three months. The Charging Party believes its certification should be extended for one year. Counsel for the parties submitted briefs arguing their respective positions, upon which, including the entire record here, I hereby make the following findings of fact, conclusions of law and recommended order:

[1] All dates are in 2004, unless otherwise indicated.

I. Jurisdiction

The Respondent is a Delaware corporation with an office and place of business in Las Vegas, Nevada, where it is engaged the business of providing medical transportation services. During the 12-month period ending June 7, 2004, the Respondent derived gross revenues in excess of $500,000, and purchased and received from points outside the State of Nevada goods valued in excess of $50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

The Charging Party, Service Employees International Union, Local 1107, AFL-CIO (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

On May 16, 2003, the Union was certified as the employees bargaining representative in the following unit:

> All full-time and regular part-time (a regular part-time employee is one who has performed at least 36 hours of work per month from the period of October 21, 2001, to April 20, 2002) paramedics, EMT-I's and EMT's employed by the Respondent at its Las Vegas, Nevada facility; excluding all other employees, office clerical employees, supply employees, dispatchers, special event employees, transporters, field training officers, guards and supervisors as defined under the Act.

On May 17, 2004, an initial decertification petition was filed. It was apparently withdrawn (for reasons unknown) and a second such petition was filed on June 22, and is still pending though blocked by the charge in this matter, which was filed on June 22, and amended on July 28. The Complaint alleges that on March 30, 2004, the Respondent insisted as a condition for engaging in collective bargaining that the Union agree to certain "ground rules" and that these were not mandatory subjects of bargaining. It is further alleged that since April 22 the Union has requested certain relevant information which the Respondent declined to furnish.

Having withdrawn its answer, the Respondent admits that it engaged in the conduct alleged and in accepting the General Counsel motion for judgment on the pleadings, has agreed to withdraw insistence on the "ground rules" and to furnish the requested information. I therefore conclude that the Respondent committed the acts alleged and thereby violated Section 8(a)(5) of the Act.

As noted above, the only issue remaining involves the Union's "certification year" – the period during which the Union's status as the bargaining unit employees' exclusive representative cannot be contested.

It is well settled that neither party to collective bargaining negotiations must agree to any particular proposal. The Act requires only that they bargain in good faith which means, among other things, that they have a good faith intent to reach an agreement. However, collective bargaining is not a technical exercise. Rather, it is the process by which parties can mutually agree to the wages, hours and other terms and conditions of employment. Thus not only is a

union's majority status conclusively presumed for one year following a representation election, "absent unusual circumstances, an employer will be required to honor a certification for a period of 1 year" where the employer's unfair labor practices deprived the union of a fair opportunity to reach an agreement. *Mar-Jac Poultry Co.,* 136 NLRB 785, 786 (1962). The policy purpose of this rule is to give unions who are selected as employees bargaining representative a reasonable opportunity to negotiate a collective bargaining agreement during their time of greatest strength and free of concern that they will have to defend their status. *Van Dorn Plastic Machinery Co.,* 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991).

The Board has therefore held that the remedy for an employer's refusal to bargain unfair labor practices "to assure at least a year of good-faith bargaining include an extension of the certification year." *Northwest Graphics, Inc.,* 342 NLRB No. 127, slip op 2 (2004). The Board recognized that the length of such an extension depends on a number of factors, such as the bargaining history. While there is no factual record here, I do consider representations of counsel in reaching my conclusion that the Union's certification should be extended one year.

The question is how long, if any, an extension should be in order to assure that the Respondent in fact complies with its duty to bargain in good faith. In arguing for a three month extension, the General Counsel notes that there was only one bargaining session in the first year following certification. However, there is no factual record indicating the reason for the delay and it cannot be assumed that such resulted from some dereliction on the part of the Union. Indeed, the Union asserts, and the Respondent denies, that this hiatus was caused by the Respondent's bad faith. Since there is no evidence to resolve this conflict, I reject the General Counsel's argument that equity suggests only a three month extension because the "Union waited much longer (than in *Mar-Jac*), and did not meet until ten and a half months after certification," and "(t)he Union should be held responsible for at least part of the delay." It may be true that the Union shares responsibility, but there are simply no facts to support such a conclusion. It is an assumption by the General Counsel on which I cannot rely. The General Counsel also notes that the Respondent has been bargaining without being compelled to do so, but I conclude that this factor is not significant since the Respondent continued to engage in the activity alleged to be unlawful.

Counsel for the Respondent argues that since November 2004, the parties have met; that it has modified its "ground rules" and has furnished information and the parties have scheduled bargaining sessions on April 5, 6, 7, 8, May 11, 12 and June 1, 2, and 3, 2005. Therefore no extension is warranted, or at a maximum, the three months proposed by the General Counsel would be appropriate. Counsel's stated reason for the short extension is because certain employees filed a decertification petition, which has been blocked by these unfair labor practices charges. On brief, Counsel stated, "As AMR represented to the Judge (at the hearing) AMR's motivation (in withdrawing its answer) was to activate the Region's processing of the employees' decertification petition, by disposing of the instant charge in the most expeditious fashion."

These words belie a good faith intent on the part of the Respondent to try to reach an agreement during the scheduled bargaining sessions. The core issue here is what remedy will insure good faith collective bargaining. But in the mix is the pending, though blocked, second decertification petition filed one year and one month after the Union's certification. Though the findings here of the Respondent's unfair labor practices might or might not bar processing the decertification petition, *Saint Gobain Abrasives, Inc.,* 342 NLRB No. 39 (2004), an executed collective bargaining agreement probably would. See *Direct Press Modern Litho, Inc.,* 328 NLRB 860 (1999) for a discussion of the Board's contract bar rule. It is therefore difficult to

reconcile the Counsel's professed desire to have employees vote a second time with a good faith intent to reach an agreement during the period Counsel suggests.

Counsel's repeated assertions that it only seeks to champion the employees' "fundlemental rights guaranteed by Section 7 of the Act" to a decertification vote is, I conclude, disingenuous. The Union was certified on May 16, 2003, which means that a majority of the bargaining unit voted to be represented by the Union. One year and one day later someone, filed a petition for decertification. That petition was apparently withdrawn and a second filed a month later.

It is certainly fundlemental to the policies of the Act that employees be able to express their desire for representation. But stability of the collective bargaining relationship is also a fundlemental policy. Therefore, once a majority of employees have spoken, then their elected bargaining representative must be given a reasonable period, free of side distractions, to bargain a collective agreement. I believe that in order to give the Union a fair opportunity to negotiate an agreement without extraneous matters affecting negotiations, such as the Respondent's interest in there being a second election, the Union should have an additional year. Given the Respondent's stated position, a three month extension would not likely result in bona fide good faith bargaining.

The question then becomes when the year should start. Counsel for the General Counsel cites many cases wherein the Board ordered the extended year to begin when the employer began bargaining in good faith, and notes the parties have had bargaining sessions since November or December 2004. However, I cannot conclude, based on the record here, that the Respondent has ever bargained in good faith, since it continued to insist on "ground rules" and continued to withhold requested information. Therefore I shall recommend the year commence from the date the Respondent complies with the order here.

Upon the foregoing findings of fact and conclusions of law, I make the following recommended:

ORDER[2]

The Respondent, Mercy, Inc., d/b/a American Medical Response, its officers agents, successors and assigns, shall:

1. Cease and desist from:

   a. Refusing to bargain collectively and in good faith with the Union concerning wages, hours and others terms and conditions of employment.

   b. Refusing to furnish the Union information necessary and relevant to collective bargaining.

   c. Demanding as a condition of collective bargaining negotiations non-mandatory subjects of bargaining styled "ground rules."

[2]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

d. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the above described bargaining unit concerning wages, hours and other terms and conditions of employment and if an agreement is reached, embody that agreement in a signed contract, the Union certification to be extended one year from the date the Respondent complies with this Order.

b. Within 14 days after service by the Region, post at its each of its facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees of the Respondent at any time since May 16, 2003.

c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, San Francisco, California, April 19, 2005.

James L. Rose
Administrative Law Judge

[3]If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered that we post this notice and comply with its terms.

Federal Law gives you the right to:

Form, join or assist a union,
Choose representatives to bargain on your behalf,
To act together with other employees for your benefit and protection,
Choose not to engage in any such protected activity.

WE WILL NOT refuse to bargain collectively and in good faith with the Union concerning wages, hours and others terms and conditions of employment for employees in the bargaining unit found appropriate.

WE WILL NOT refuse to furnish the Union information necessary and relevant to collective bargaining.

WE WILL NOT insist as a condition for bargaining on non mandatory subjects of bargaining such as our proposed "ground rules."

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain in good faith with the Union and if an agreement is reached, put it in an executed contract.

MERCY, INC., d/b/a
AMERICAN MEDICAL RESPONSE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 Las Vegas Blvd. South – Suite 400

Las Vegas, NV 89101

(702) 388-6416, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.